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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 WILDEARTH GUARDIANS and
8 WESTERN WATERSHEDS
PROJECT,

9 Plaintiff,

10 v.

11 KRISTIN BAIL, in her official
12 capacity as Forest Supervisor of the
Okanogan- Wenatchee National Forest,
and U.S. FOREST SERVICE,

13 Defendants,

14 and

15 S. MARTINEZ LIVESTOCK, a
16 Washington Corporation,

17 Defendant-Intervenor.

NO: 2:20-CV-0440-TOR

ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT

18 BEFORE THE COURT are Plaintiff's Motion for Summary Judgment (ECF
19 No. 65), the Forest Service Defendants' Cross-Motion for Summary Judgment
20 (ECF No. 69), and Defendant-Intervenor's Cross Motion for Summary Judgment

1 (ECF No. 71). The motions were previously set for hearing with oral argument
2 (ECF No. 79), but the Court has determined oral argument is unnecessary pursuant
3 to LCivR 7(i)(3)(B)(iii). Accordingly, the Court vacates the hearing set for
4 September 22, 2022, as moot and because the present motions deserve a prompt
5 disposition. The Court has reviewed the motions and the record, the completed
6 briefing and is fully informed.

7 For the reasons discussed below, Defendants' Motions for Summary
8 Judgment are **GRANTED**.

9 **BACKGROUND**

10 This case concerns Plaintiffs WildEarth Guardians' and Western Watersheds
11 Project's challenge to the U.S. Forest Service's authorization of domestic sheep
12 grazing on allotments within the Okanogan-Wenatchee National Forest. Plaintiffs
13 complain that grazing on these allotments poses a high risk that domestic sheep
14 will come into contact with and transmit disease to bighorn sheep, which can
15 happen quickly and lead to die-offs of bighorn sheep herds. WildEarth Guardians
16 is a non-profit organization dedicated to protecting and restoring the wildlife, wild
17 places, wild rivers and health of the American West and has over 188,000
18 members. Western Watersheds Project is a non-profit membership organization
19 dedicated to protecting and conserving the public lands and natural resources of
20 watersheds in the American West and has over 12,000 members and supporters.

1 Plaintiffs contend that there is a high risk of disease transmission between
2 domestic sheep and bighorn sheep herds, affecting the latter population's viability.
3 Plaintiffs allege that despite being aware of these risks, the Forest Service has
4 continued to authorize grazing on the Wenatchee Allotments, rather than closing
5 these allotments, while new environmental analyses are completed. ECF No. 65.
6 Plaintiffs argue that by continuing to authorize domestic sheep grazing, the Forest
7 Service has violated its duties under the National Forest Management Act (NFMA)
8 to protect bighorn sheep populations, and its duties under National Environmental
9 Policy Act (NEPA) to supplement outdated analyses and prevent an irreversible
10 commitment of resources in the interim. *Id.* Plaintiffs have stated the following
11 claims for relief pursuant to the judicial review provisions of the Administrative
12 Procedure Act (APA), 5 U.S.C. § 706:

13 Claims 1 and 3: Challenge to the Forest Service's annual
14 operating instructions (AOIs) that authorized domestic sheep
15 grazing on the Nile, Rattlesnake, Manastash, and Mosquito
Ridge allotments in 2016–2021, which was inconsistent with the
Wenatchee Forest Plan and violated the NFMA and NEPA;¹ and

16 Claim 2: Challenge to the Forest Service's failure to supplement
17 its environmental analyses for the allotment management plans

18 ¹ On their face, these claims appear to be moot, but according to the Ninth
19 Circuit, "A controversy remains live so long as effective relief is still available."
20 *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1094 (9th Cir. 2003).

1 (AMPs) that govern domestic sheep grazing on the Okanogan-
2 Wenatchee National Forest, in violation of the NEPA.

3 *See* ECF No. 65 at 6.

4 The Federal Defendants contend Plaintiffs lack standing because there is no
5 causal connection between their alleged injury and the Forest Service's conduct.
6 Specifically, the Forest Service contends that animals grazing on state-owned and
7 private lands, lawful hunting, and relocation of bighorn sheep by the Washington
8 Department of Fish and Wildlife, is the cause for any complained of injury, none
9 of which is controlled by the Forest Service. Additionally, there is no evidence
10 showing that a disease outbreak among bighorns has been caused by domestic
11 sheep from the federally managed allotments, as opposed to domestic sheep on
12 private or state-owned land. ECF No. 69 at 22-25. The Federal Defendants further
13 contend that the Forest Service's best management practices have effectively
14 mitigated the risk of disease transmission. ECF No. 69 at 28-32. But most
15 importantly, the Forest Service contends that the Federal Land Policy and
16 Management Act precludes Plaintiffs' claims because the Forest Service has been
17 delegated the timing of its NEPA review, which is not subject to judicial
18 intervention. ECF No. 69 at 34-40. The Forest Service also seeks to strike extra-
19 record evidence.

Defendant-Intervenor S. Martinez Livestock essentially joins in the Forest Service's substantive arguments. ECF Nos. 71, 78.

STANDARD OF REVIEW

A movant is entitled to summary judgment if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

Agency decisions that allegedly violated NFMA and NEPA are reviewed under the APA. *All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1112 (9th Cir. 2018). The APA imposes a deferential standard of review, which is limited to a determination of whether the agency acted in a manner that was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.*; *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (citing 5 U.S.C. § 706(2)(A)). Under this standard, courts “do not substitute [their] judgment for that of the agency.”” *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012). Review is limited to the administrative record before the agency decision-maker. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decision making. *Id.* at 744. A decision should only be reversed as arbitrary and capricious “if the agency relied on factors Congress did not intend it to consider, entirely failed to consider

1 an important aspect of the problem, or offered an explanation that runs counter to
2 the evidence before the agency or is so implausible that it could not be ascribed to
3 a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs.*
4 *Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

5 “When a reviewing court considers evidence that was not before the agency,
6 it inevitably leads the reviewing court to substitute its judgment for that of the
7 agency.” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d at 602
8 (quoting *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir.1980)). Expansion of
9 the administrative record is only allowed in four narrowly construed
10 circumstances:

- 11 (1) supplementation is necessary to determine if the
12 agency has considered all factors and explained its
decision;
- 13 (2) the agency relied on documents not in the record;
- 14 (3) supplementation is needed to explain technical terms
or complex subjects; or
- 15 (4) plaintiffs have shown bad faith on the part of the
agency.

16 *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d at 603 (“Keeping in
17 mind the Supreme Court’s concerns with reviewing court factfinding, we have
18 approached these exceptions with caution, lest “the exception . . . undermine the
19 general rule.” (citation omitted)).

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DISCUSSION

Plaintiffs' Motion for Summary Judgment (ECF No. 65) seeks a declaration that the Forest Service violated NEPA and NFMA by continuing to allow grazing on the Nile, Rattlesnake, Manastash, and Mosquito Ridge allotments before completing a new NEPA analysis. ECF No. 65 at 39-40. In their reply, however, Plaintiffs revise their claim to say that their "claim is not that the agency must 'refuse renewal of a grazing permit' or must stop grazing simply because the agency has not completed a routine NEPA analysis here. . . . Instead, Plaintiffs argue that the agency may not hide behind this 'limited grace period' to avoid studying the known risks and consequences of grazing on the Wenatchee Allotments." ECF No. 73 at 25.

Plaintiffs further argue that "[t]he Court should thus not permit the agency to indefinitely postpone completing the necessary supplemental NEPA analysis to address the conflicts between domestic and bighorn sheep on the Forest and instead should order the agency to conduct that analysis under the process and timeline stated in the Bail Declaration." ECF No. 73 at 25.

I. Federal Land Policy and Management Act (FLPMA)

The Forest Service contends that the Federal Land Policy and Management Act precludes Plaintiffs' claims because the Forest Service has been delegated the timing of its NEPA review, which is not subject to judicial intervention. In the

1 meantime, the Forest Service shall continue a permit or lease until a decision has
2 been made on any supplemental environmental analysis.

3 In 2014, Congress amended the Federal Land Policy and Management Act
4 to specifically provide the following subsection:

5 (i) Priority and timing for completion of environmental analyses

6 The Secretary concerned, in the sole discretion of the Secretary
7 concerned, shall determine the priority and timing for completing
8 each required environmental analysis with respect to a grazing
9 allotment, permit, or lease based on—

10 (1) the environmental significance of the grazing allotment,
11 permit, or lease; and
12 (2) the available funding for the environmental analysis.

13 43 U.S.C. § 1752(i).

14 Subsection 1752(c)(2) provides: The terms and conditions in a grazing
15 permit or lease that has expired, or was terminated due to a grazing preference
16 transfer, **shall** be continued under a new permit or lease until the date on which the
17 Secretary concerned completes any environmental analysis and documentation for
18 the permit or lease required under the National Environmental Policy Act of 1969
19 (42 U.S.C. 4321 et seq.) and other applicable laws (emphasis added).

20 A NEPA analysis is not required to be completed before a permit is
renewed. *W. Watersheds Project v. Bernhardt*, 392 F. Supp. 3d 1225, 1249 (D.
Or. 2019). This is not, however, an exemption or exclusion from the requirements
of NEPA or other applicable laws. *Id.* This provision merely allows for a “limited

1 grace period” for the agency to conduct the required environmental analysis. *Id.*
2 (citations omitted). After the required environmental review is completed, permits
3 may then be canceled, suspended, or modified. *Id.* Plaintiffs seem to agree with
4 these basic principles but seem to want the Court to carve out exceptions. ECF No.
5 73 at 21.

6 The Forest Service acknowledges that it will be conducting supplemental
7 NEPA analysis and explains that the delay so far was the result of resource
8 constraints, loss of key staff members, and historic wildfires that pulled employees
9 away from their normal duties. The Forest Service argues that it is comfortably
10 within the grace period conferred by § 1752(i) and an order from this Court on
11 priority and timing would expressly be violative of what Congress delegated solely
12 to the agency.

13 Plaintiffs complain that the “agency’s track record of broken promises”
14 make it likely that the agency will extend this process again and again. Plaintiffs
15 argue that the “agency’s estimated delay is unreasonable given the risk . . .” ECF
16 No. 73 at 24.

17 Given the unequivocal Congressional delegation, the Court concludes that at
18 this time, the Court does not have the authority or jurisdiction to set the priority
19 and timing of such supplemental review. 43 U.S.C. § 1752(i) (“the sole discretion
20 of the Secretary concerned, shall determine the priority and timing for completing

1 each required environmental analysis with respect to a grazing allotment, permit,
2 or lease"). The Forest Service has acknowledged its responsibilities and has begun
3 the process of a supplemental environmental review.

4 Accordingly, Plaintiffs' challenge is premature and not properly before the
5 Court. Because the Forest Service has not completed its final analysis, there is no
6 final decision for this Court to review at this time.

7 **II. Article III Standing**

8 Given the disposition of this case, the Court does not specifically rule on
9 whether Plaintiffs have Article III standing by merely alleging a risk of harm
10 without proving actual harm based on Defendants' conduct.

11 **III. Request to Strike Declarations**

12 Given the disposition of this case, the Court has not considered the extra-
13 record Declarations filed by Plaintiffs in support of their arguments.

14 **CONCLUSION**

15 Defendants have demonstrated there is no genuine issue of material fact and
16 Plaintiff's claims fail at this time as a matter of law.

17 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 18 1. Plaintiff's Motion for Summary Judgment (ECF No. 65) is **DENIED**.
- 19 2. The Forest Service Defendants' Cross-Motion for Summary Judgment
20 (ECF No. 69) is **GRANTED**.

3. Defendant-Intervenor's Cross Motion for Summary Judgment (ECF No. 71) is **GRANTED**.

The District Court Executive is hereby directed to enter this Order and Judgment accordingly, furnish copies to counsel, and **CLOSE** the file.

DATED June 7, 2022.



THOMAS O. RICE
United States District Judge